

76-983.1

Supreme Court, U. S.

FILED

JAN 14 1977

MICHAEL RODAK, JR., CLERK

IN THE  
Supreme Court of the United States

No. \_\_\_\_\_

October Term, 1976

EUGENE GOSPER,

*Petitioner,*

*vs.*

E. R. FANCHER and THE BROTHERHOOD OF  
LOCOMOTIVE FIREMEN & ENGINEMEN,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI  
TO THE COURT OF APPEALS OF  
THE STATE OF NEW YORK

FENTON F. HARRISON,

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1012 Niagara Frontier Building,  
Buffalo, New York 14202.

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IN THE

## Supreme Court of the United States

October Term, 1976

No. . . . .

EUGENE GOSPER, *Petitioner*;

vs.

E. R. FANCHER and THE BROTHERHOOD OF  
LOCOMOTIVE FIREMEN & ENGINEMEN,  
*Respondents.*

### PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The Petitioner, Eugene Gosper, respectfully prays that a writ of Certiorari issue to review a judgment entered on remand by the Court of Appeals of the State of New York dated on October 22, 1976.

### Opinions Below

The opinion of the New York Court of Appeals reported at 40 N.Y. 2d 867 (1976), affirming the New York Appellate Division is reprinted in the Appendix at page 2a through 3a.

The Court of Appeals affirmance was based upon the opinion of the New York State Supreme Court, Appellate Division, Fourth Department.

The opinion of the Appellate Division affirming as to liability and reversing and ordering a new trial as to damages is reported at 49 App. Div. 2d 674 and is printed in the record at pp. 892-893.

### **Jurisdiction**

The Court of Appeals Decision and order affirming the judgment entered on mandate of the Appellate Division, Fourth Department, reversing in part judgment granted for the petitioner in the Trial Court was entered on October 22, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

### **Questions Presented**

1. Whether a union member wronged by his union's breach of its duty of fair representation can recover damages from the union alone when the employer is not sued either independently or in the same action.
2. Whether lost earnings caused by a union's breach of its duty of fair representation are a proper measure of damages recoverable from the union.
3. Whether the right to appellate review of a state court decision applying federal law can be restrained by requiring an appellant to stipulate to a judgment absolute as a condition precedent to appellate review.

### **Constitutional Provision Involved**

U. S. Constitution, Amendment VII

### **Statutes Involved**

Railway Labor Act, 45 U.S.C., Sections 151a, 152, 153; NYCPLR § 5601(c).

### **Statement of Facts**

This is a case arising out of the mandatory arbitration provisions of the Railway Labor Act pertaining to adjustment of minor disputes and the implementation of a contract between the Respondent, Brotherhood of Locomotive Firemen & Enginemen (hereafter referred to as "Brotherhood") and Petitioner's former employer, the Erie-Lackawanna Railroad (hereinafter referred to as "Carrier").

In the Spring of 1965, Petitioner, Eugene Gosper, a Brotherhood member in good standing was twice subjected to disciplinary proceedings by the Carrier. In each instance, as required by the Brotherhood Constitution, he referred the charges to the local chairman of the grievance committee of the Brotherhood. Brotherhood grievance committee-men represented the Petitioner at hearings held by the Carrier pursuant to the contract in effect between The Brotherhood and the Carrier. Following said hearings, the Carrier "disciplined" Petitioner by discharging him from employment.

The Contract between the Brotherhood and the Carrier provided for appeal of disciplines from the local level to a second level comprised of the general chairman of the Brotherhood's grievance committee (Respondent, Fancher) and the highest officer of the carrier authorized to handle grievances. The contract also recognized the employee's right, failing adjustment at the general grievance committee level, to have the case presented to the Railway Adjustment Board or, in this case, a special Board of Adjustment created by

agreement between the Carrier and the Brotherhood. The contract specifically provided that appeals from the local level to the level of general chairman had to be presented within 60 days or the discipline would become final and binding.

The undisputed facts of this case are that, following rejection at the local level, the Petitioner's grievances were referred by the local chairman to the Brotherhood's general chairman but that no steps were ever taken to present Petitioner's case to the highest officer of the Carrier authorized to handle grievances, with a result that Petitioner's discharges became final and binding.

There also was evidence presented at the trial Court level upon which a jury could find that the general chairman lied to Petitioner about the status of his grievance with the result that the Petitioner lost his rights to withdraw his grievances from the Brotherhood and handle them himself up to the final level of adjustment. Petitioner did not discover that appeal of his discipline had not been perfected or that he had lost his rights to pursue his grievances until January of 1968, when a new general chairman of the grievance committee wrote to him advising that he could find no evidence that his claim had been presented within the time limits of the contract and concluding that his claim had been mishandled (Ex. 1 reprinted in Appendix pp. 5a, 6a).

Petitioner then sought counsel and suit was instituted against the Brotherhood and various of its officers as Defendants, seeking *not* damages for wrongful discharge, but to recover economic losses sustained as a result of the union's wrongful failure to secure his restoration to train service.

Petitioner's grievances arose out of disciplinary charges that: (1) he violated rules of the operating department of the

Carrier with regard to responsibility for a train wreck on January 26th, 1965, and, (2) that he falsified an employment application in 1956. At the trial level, Petitioner presented evidence that both of his grievances had merit and there was reasonable likelihood of mitigation of discipline with restoration to train service if the grievances had been properly handled by the Respondents.

As to the first charge, evidence was presented that Petitioner was the fireman, not the engineer, on the unit involved in the wreck and that he was sitting on the blind side of the engine when the unit allegedly ran a cautionary signal. Petitioner also presented evidence that the engineer, after first being discharged by the Carrier, was eventually restored to train service through the efforts of his union.

As to the second charge of falsification by Petitioner of his employment application, evidence was presented showing that the Carrier's own records indicated that the Carrier had full knowledge of the alleged falsification in 1958, and officially waived its claimed right to discharge him for said falsification in 1961. Evidence was then presented that the contract specifically barred any disciplinary proceedings against Petitioner not instituted within seven days of the time that the Carrier first had knowledge of the alleged infraction. Thus the charges against Petitioner were time barred by several years before they were actually filed.

Evidence was presented on trial from which a jury could reasonably find that the Petitioner's grievances were handled in a perfunctory manner at the local level in that the presentations were not fully written up with facts, quotations of rules, past precedents, Board Awards and arguments; that Petitioner was given bad advice by the individual Respondents; that Respondents made no effort to secure the Carrier's

records; that whatever decisions were made by the general chairman were arbitrary in that there were no consultations with Petitioner or the local chairman; that the appeals were not perfected within the time limits; and that the general chairman not only misled, but actually lied to Petitioner as to the actual status of his claim.

Evidence was then presented that the Petitioner was forced by his discharge to take lower paying jobs unrelated to his railroad qualifications. Petitioner offered proof of damages to the time of trial by evidence of the earnings of the next lower man in Petitioner's position on the Carrier's seniority roster as compared to his own earnings during the time from his discharge to the trial. Following a jury verdict, judgment was entered in Petitioner's favor against the Brotherhood and Defendant Fancher as general chairman of the grievance committee in the amount of \$40,000.00.

**Decision of the Appellate Division of  
the State of New York, Fourth Department**

The Appellate Division reversal on the issue of damages was based on what Petitioner considers to be a misinterpretation of *Czosek vs. O'Mara*, 397 U.S. 25 (1970), and a misapplication of *Schum vs. South Buffalo Railway Company*, 496 F 2d 328 (1974). The Appellate Division in its opinion, stated:

*"Upon the trial the jury was erroneously charged that the difference between Plaintiff's prior fireman's income and his reduced income after termination was a proper measure of damages. The union, however, was only liable for loss of employment damages 'to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer' (Czosek v. O'Mara, 397 U.S. 25, 29, 90 S. Ct. 770, 773, 25 L Ed. 2d 21; Schum v. South Buffalo Railway Co., 2 Cir., 496 F 2d 328). Because*

Plaintiff has not established any compensable damages within this rule of federal labor law we are, therefore, constrained to reverse and grant a new trial on the issue of damages only." (emphasis ours).

**Decision of the Court of Appeals  
of the State of New York**

Thereafter, Petitioner appealed the decision of the Appellate Division to the New York State Court of Appeals, the State Court of last resort. In order to secure further review of his federally bottomed rights, however, Petitioner was required by New York State Law to stipulate for 'judgment absolute' CPLR 5601(c).

The Court of Appeals in a brief memorandum decision affirmed the judgment of the Appellate Division with a brief additional reference to this Court's 1976 decision in the case of *Hines vs. Anchor Motor Freight*, 424 U.S. 554, 96 S.Ct. 1048. The result is that the Petitioner, having proven a breach of Respondent's duty of fair representation to the satisfaction of the jury and the Appellate Division, is nevertheless left without restitution of his damages.

This Petition for Certiorari is timely filed, pursuant to 28 USC § 2101 (c).

**REASONS FOR GRANTING THE WRIT**

**Question No. 1**

**Whether a union member wronged by his Union's breach of its duty of fair representation can recover damages from the union alone when the employer is not sued either independently or in the same action.**

By laying down a rule eliminating economic losses and limiting the recovery of wronged union members against their

own union in unfair representation cases to added difficulty and expense in recovering from the employer, the New York Courts have effectively foreclosed any recovery against the union where no recovery was ever sought against the employer.

In this case, Petitioner never sought to treat his disciplines by the Carrier as final and thus seek damages for wrongful discharge. Instead, he sought continuance of the contract of employment by restoration to train service. He sued the union for failing to secure his restoration to train service.

Petitioner's reason for not suing his employer is not really important. The question presented to this Court as a result of the New York holdings is basic and of general interest in the field of labor relations, namely, can there be any recovery against the union where there are no added expenses and difficulties arising out of a suit against the employer because the employer was never sued?

We suggest that the bizarre rule laid down by the New York Appellate Division and adopted by the Court of Appeals is based upon a misreading of this Court's opinion on *Czosek v. O'Mara*, 397 U.S. 25 and a total misapplication of *Schum v. South Buffalo Railway Co.*, 496 F.2d 328, and is certainly not reconcilable with the philosophy of this Court as set forth in *Vaca v. Sipes*, 386 U.S. 171.

We understand *Czosek* to stand for the rule that an employer is not a necessary party in an unfair representation suit against a union. Reading *Czosek* to mean that damages against a union for an independent wrong or concurrent wrong are unrecoverable would appear to lead to a conflict with this Court's own decisions in *Vaca* and *Conley v. Gibson*, 355 U.S. 41. At the very least, it has given rise to a confusion

in the field of labor relations which should be resolved by this Court.

In *Vaca* this Court seemed to clearly indicate that damages could be assessed against a Union consistent with the proportion of the total damage caused by the fault of the union. Mr. Justice White said at pg. 195 of 386 US:

"The appropriate remedy for a breach of union's duty of fair representation must vary with the circumstances of the particular breach . . ."

And at page 187:

". . . Presumably, in at least some cases, the union's breach of duty will have enhanced or contributed to the employee's injury. What possible sense could there be in a rule which would permit a Court that has litigated the fault of the employer and union to fashion a remedy only with respect to the employer? Under such a rule either the employer would be compelled by the Court to pay for the union's wrong—slight deterrence, indeed, to future union misconduct—or the injured employee would be forced to go to two tribunals to repair a single injury

. . .

And at pages 197-198:

"The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases, if any, in those damages caused by the union's refusal to process the grievance should not be charged to the employer . . ."

This Court again speaking the Mr. Justice White in *Czosek* said at pp. 28-30 of 397 US2:

"Neither the individual respondents nor the railroad sought review here of the Court of Appeals' judgment insofar as it sustained the dismissal of the complaint against the railroad absent allegations implicating the railroad in the union's claimed breach of duty. The petitioning union defendants, however, challenge this aspect of the Court of Appeals' decision insisting that they may not be sued alone for breach of duty when the damage to employees had its roots in their discharge by the railroad prior to the union's alleged refusal to process grievances. Apparently, fearing that if sued alone they may be forced to pay damages for which the employer is wholly or partly responsible, the petitioners claim error in the Court of Appeals' affirmance of the dismissal of the suit against the railroad. Their fears are groundless. The Court of Appeals permitted the railroad to be made a party to the suit if it is properly alleged that the discharge was a consequence of the union's discriminatory conduct or that the employer was in any other way implicated in the union's alleged discriminatory action."

"If these allegations are not made and the employer is not a party defendant, *judgment against petitioners can in any event be had only for those damages that flowed from their own conduct. Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievance added to the difficulty and expense of collecting from the employer. If both the union and the employer have independently caused damage to employees, the union cannot complain if separate actions are brought against it and the employer for the portion of the total damages caused by each.*" (Emphasis ours).

Thus there appears to be a tantalizing conflict between apportioning liability according to the damage caused by each;

not making the employer pay for the union's wrong; and unrecoverable damages except for added difficulty and expense in collecting from the employer. We do not believe that *Czosek* was meant to overrule *Vaca*. Certainly in neither case was the Court called to decide upon the precise fact situation here presented. Furthermore, the New York ruling is patently inconsistent with the underlying philosophy of this Court as expressed by Mr. Justice White in *Vaca* when he said at Page 187 of 386 U.S.:

"What possible sense could there be in a rule which would permit a Court that has litigated the fault of the employer and union to fashion a remedy only with respect to the employer? Under such a rule either the employer would be compelled by the Court to pay for the union's wrong—slight deterrence, indeed, to future union misconduct or the injured employee would be forced to go to two tribunals to repair a single injury . . ."

The holdings in the present action by the New York State Courts are completely inconsistent with that policy. The Petitioner suffered damages due to the gross misconduct of his union as determined by the jury and affirmed by the Appellate Division. Nevertheless, the interpretation of the Federal Labor Law used by the Appellate Division and Court of Appeals results in prohibiting recovery by Petitioner for his damages and thus protects the union from any penalty for its wrong doing. The effect of the lower Court's rulings is to hold that a union is not responsible for its misconduct. Such a result can hardly discourage union misconduct. This can only lead to less emphasis by a union on adequately representing the interests of members. Petitioner does not believe that this Court intended such an absurd result.

The holdings below based on *Schum* are clearly inappropriate since the Court was there concerned with a

motion to dismiss by the employer and never considered what damages might be recovered against the union. Perhaps therein lies the greatest vice of the rulings below for they seem to go off on a belief that an employee has no remedy other than a suit against his employer. Such a view cannot be reconciled with the holdings of this Court.

This Court looked again at this very complex field of law last spring in *Hines v. Anchor Motor Freight Inc.*, 424 U.S. 554. The subject of damages was there touched upon in Mr. Justice Stewart's concurring opinion and Mr. Justice Rehnquist's dissent. Both justices seemed to indicate that damages were in principle at least recoverable against a union regardless of what damages might be proven against the employer. Their views cannot be reconciled with a reading of *Czosek* that damages other than attorney's fees in the suit against the employer are unrecoverable against the union.

We suggest, therefore, that further confusion will result in the Courts below and this Court should now speak to the question of whether damages may be recovered against a union where there is not and never was a suit against the employer.

#### Question No. 2

**Whether lost earnings caused by a union's breach of its duty of fair representation are a proper measure of damages recoverable from the union.**

Assuming that the philosophy of this Court is to permit recovery of damages against a union sued alone, the question then arises as to the correct measure of damages.

In *Hines v. Anchor Motor Freight*, 424 U.S. 554, Mr. Justice Stewart said in a concurring opinion:

"If an employer relies in good faith on a favorable arbitral decision, then his failure to reinstate discharged employees cannot be anything but rightful, until there is a contrary determination. *Liability for the intervening wage loss must fall not on the employer but on the union.* Such an apportionment of damages is mandated by Vaca's holding that 'damages attributable solely to the employer's breach of contract should not be charged to the union, but increases, if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer.' 386 U.S. at 197-198, 87 S. Ct. at 920, 17 L.Ed. 2d at 862. To hold an employer liable for back wages for the period during which he rightfully refuses to rehire discharged employees would be to charge him with a contractual violation on the basis of conduct precisely in accord with the dictates of the collective agreement."

The clear implications of Mr. Justice Stewart's views are that the union should be held liable for the employee's economic losses at least during the period that the matter remained in conflict due to the union's dereliction of duty.

This view was roughly the theory of petitioner's law suit. He did not sue for wrongful discharge damages; perhaps in the light of *Hines* he should have joined the employer—but for reasons no longer important he did not, and instead sought damages against his union for his economic losses which he incurred by being out of train service as a result of the Brotherhood's wrongful failure to diligently prosecute his grievances and secure his restoration to train service. He offered proof that the Brotherhood knew or should have known that his grievances had merit and that with proper handling there was reasonable likelihood of restoration to train service. He also offered for the jury's consideration (and with great difficulty owing to evidentiary rulings by the trial judge) the time it took another union to secure the engineer's

restoration to service in one of the disciplines here under consideration. It would appear that the Carrier would have been justified in continuing the Petitioner's dismissals on the basis of the 60 day time bar of the contract, at least until the local level ruling was overturned at the general chairman level or by the Special Board.

The New York Appellate Division flatly held that Petitioner's economic losses were not a proper measure of damages and by limiting him to proof of added difficulty and expense in recovering from the employer where there were no such elements effectively precluded him from any recovery at all.

Petitioner contends that the proper measure of damages against the union in the present action was the net loss of earnings suffered by the Petitioner due to the union's failure to process Petitioner's grievance.

Perhaps anticipating Mr. Justice Stewart's views in *Hines*, the Petitioner offered the fact finders evidence of what he might have earned less what he did earn between the time he was pulled from train service by the Carrier and a time shortly before trial; the jury then decided Petitioner had suffered economic damage in a certain amount.

*Note that New York has not simply quarrelled with the judge's charge to the jury on lost earnings; it has thrown out the whole concept. In so doing the New York Courts have not only ignored Mr. Justice Stewart's views in Hines, but have come down squarely opposite to the rule of damages approved by the Fourth Circuit in Thompson vs. the Brotherhood, 367 F.2d 489, Cert. Den. 386 U.S. 960. In Thompson, the Plaintiff was aggrieved by the failure of his union to process a grievance and proved damages (as did Petitioner in this case) by showing*

what he might have earned based on the actual earnings of other employees similarly situated on the seniority list less what he actually did earn, carried out by his work expectancy. Judge Sobeloff speaking for the Court, said at Page 493:

"We are of the opinion that the District Court did not abuse its discretion in refusing to set aside the jury's verdict. Appellant objects to the allowance of any damages for future losses on the ground that they are too speculative. The propriety of an award for future losses, however, is implicit in the decisions of the Supreme Court in *John Wiley & Sons, Inc. vs. Livingston*, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed. 2d 898 (1964) and *Textile Workers Union of America vs. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed. 2d 972 (1956). *Wiley* establishes that seniority rights do not necessarily terminate at the expiration of the collective bargaining agreement. *Lincoln Mills* mandates the federal courts to fashion effective remedies for the impairment of federally created rights in the field of labor relations. *Since neither the plaintiff nor the defendant saw fit to make the railroad a party to this action, the only effective remedy is a damage award for the loss of past and future earnings. Although Thompson's loss of future earnings cannot be established with absolute precision, we agree with the District Court's conclusion that the jury's verdict provides a reasonably accurate measure and appears to have taken into account factors which might operate in mitigation of the loss. An injured party is not barred from a reasonable recovery merely because he is unable to prove his damages with absolute certainty. See Zdanok vs. Glidden Co., 288 F. 2d 99, 104, 90 A.L.R. 2d 965 (2d Cir. 1961), aff'd. 370 U.S. 530, 82 S.Ct. 1459, 8 L.Ed. 671 (1962).*" (Emphasis ours.)

If for no other reason than to resolve the obvious conflict between the New York Rule and the Fourth Circuit Rule this Court should accept this case to assure even application of justice throughout the land in Railway Labor Cases.

### Question No. 3

**Whether the right to appellate review of a state Court decision applying federal law can be restrained by requiring an appellant to stipulate to a judgment absolute as a condition precedent to appellate review.**

Pursuant to New York CPLR 5601 (c), the Petitioner was required to stipulate to judgment absolute in order to reach the Court of Appeals. Section 5601 (c) states:

"An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him."

In the present action, the Appellate Division in interpreting Federal law had so applied the Federal labor law as to make a new trial of the issue of damages useless. Thus for all practical intent and purpose, Petitioner's quest for vindication was at an end unless he could obtain reversal and/or modification of the Appellate Division's ruling by the Court of Appeals.

The stipulation for judgment absolute is a creature of statute rather than the common law. Requiring the Petitioner to submit to this procedure in order to obtain review of a jury decision in a case involving a federal law is violative of the guarantees of the Seventh Amendment, which reads:

"... no fact tried by a jury shall be otherwise examined in any Court of the United States than according to the rules of common law"

We regret that we can offer this Court no authority on this important subject. However, it seems clear that a New York procedural requirement in derogation of common law principles should not serve to prevent and/or discourage the right to review what in fact is a final judgment.

### Conclusion

Petitioner has been the victim of the shifting sands of the law as regards a union's liability for breach of its duty of fair representation. The New York Courts interpretation of the federal law has been blinded by the question of whether or not the employer could have been made a party to this action. Irregardless of the status of the employer, the Petitioner remains damaged by the malfeasance of his union and the lower Courts remain confused as to the proper measure of damages attributable to a union's malfeasance.

If the decision of the New York Court is correct, a wronged union member can sue his union, prove liability but recover damages only as to the costs of a companion suit against his employer. Thus a union can act in the most irresponsible manner and escape effective punishment. Union misconduct will be encouraged rather than discouraged and the quality of representation to a union member will be regulated only by personal whims of the union officers. This result can hardly be that intended by this Court.

This Court has an opportunity and an obligation to clarify this area of the federal law and to determine the proper measure of damages attributable to a union's misconduct. The rights of Petitioner and others like him depend upon this Court facing the issues raised in this petition.

For all of these reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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 Tel. (716) 852-2900.

## APPENDIX A

### Decision of the Court of Appeals of New York

#### MEMORANDUM

The order of the Appellate Division should be affirmed and judgment entered in accordance with the stipulation for the reasons stated in that court's memorandum, 49 A.D.2d 674, 371 N.Y.S.2d 28, with the additional observation that the decision in *Hines v. Anchor Motor Frgt.*, 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed.2d 231, reinforces the conclusion that damages for wrongful discharge could have been sought against the employer in this case.

BREITEL, C.J., and JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE, JJ., concur in memorandum.

On Plaintiff's appeal: Order affirmed, with costs, and judgment absolute granted in accordance with plaintiff's stipulation. Plaintiff's application to be relieved of his stipulation in the event of affirmance denied.

On defendant's cross appeal: Cross appeal dismissed, without costs, upon the ground that it does not lie.

**APPENDIX B****Remittitur of the Court of Appeals**

413

**COURT OF APPEALS  
STATE OF NEW YORK**

The Hon. Charles D. Breitell,  
*Chief Judge Presiding.*

4            No. 395  
Eugene Gosper,  
            Appellant-Respondent,  
            vs.  
E. R. Fancher, et al.,  
            Respondent-Appellant.

Oct 22 2:14 PM '76

FILED

ERIE COUNTY  
CLERK'S OFFICE

The appellant in the above entitled appeal appeared by Harrison & Gruber; the respondent appeared by McDonough, Boasberg & McDonough.

The Court, after due deliberation, orders and adjudges that on plaintiff's appeal: Order affirmed, with costs, and judgment absolute granted in accordance with plaintiff's stipulation. Plaintiff's application to be relieved of his stipulation in the event of affirmance denied. On defendant's cross appeal: Cross appeal dismissed, without costs, upon the ground that it does not lie. Memorandum. All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court,

there to be proceeded upon according to law.

*Appendix B—Remittitur of the Court of Appeals.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA,  
Joseph W. Bellacosa,  
*Clerk of the Court.*

Court of Appeals, Clerk's Office, Albany,  
October 14, 1976.

**AFFIDAVIT OF SERVICE BY MAIL**

State of New York, }  
County of Genesee, } ss.:  
City of Batavia. }

Re: Eugene Gosper  
v.

E. Fancher et ano

I, Leslie R. Johnson, being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 26th day of September, 1975 I mailed 3 copies of a printed Record in the above case, in a sealed, postpaid wrapper, to:

McDonough, Boasberg & McDonough, Esqs.  
930 Walbridge Building  
Buffalo, New York 14202

Attention: Robert Boasberg, Esq.

*Appendix B—Remittitur of the Court of Appeals.*

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 p.m. on said date at the request of:

Fenton F. Harrison, Esq.  
1012 Niagara Frontier Building,  
Buffalo, New York 14202

/s/ LESLIE R. JOHNSON.

Sworn to before me this 13 day of October, 1975.

/s/ PATRICIA A. LACEY,  
Patricia A. Lacey,  
*Notary Public,*  
State of N.Y., Genesee County.

My Commission Expires March 30, 1977.

Received  
Oct 15 1975  
Court of Appeals

**APPENDIX C**

**Letter of G. A. Shawger; Plaintiff's  
Exhibit 1**

**BROTHERHOOD OF LOCOMOTIVE FIREMEN  
& ENGINEMEN**

General Grievance Committee  
Erie-Lackawanna Railroad Company  
(Former—D. L. & W. System)

G. W. Shawger, General Chairman  
201 Alan's Drive, R. D. No. 1  
Clarks Summit, Pennsylvania 18411

GGC File No. ....  
Erie-Lackawanna File No. ....

January 23, 1968

Mr. Eugene Gosper  
3 Roanoke Pkwy  
Buffalo, N.Y. 14210

Dear Sir and Brother:

In reply to your Registered Letter, which I received this date, I have read your complete file i.e., E. Gosper, E.L. File No 363 as it was presented to me by former General Chairman, E.R. Fancher. I have failed to locate Mr. Fancher's "Appeal From Discipline" to Management. The appeal to have been made within the Time Limit Rules. As a matter of fact, I find no evidence that the appeal was made at any time, neither can I find any evidence that Mr. Fancher requested waiver of the Time Limit Rules nor that the case be held in abeyance for future handling with Management before presenting said case to a Board. Paragraph (e) Limit on Time

*Appendix C—Letter of G. A. Shawger; Plaintiff's Exhibit 1.*

Claim Agreement of 1955; which in turn leads me to believe that the case was not properly handled.

Therefore, if the appeals cannot be found, or if they were not made, it would be impossible to take this case before a Board.

In conclusion, I would suggest that your attorney follow a positive course of action so that your case may be brought to a complete final conclusion.

Fraternally yours,

G. W. SHAWGER,

G. W. Shawger.

cc: File

Supreme Court, U. S.

FILED

FEB 14 1977

MICHAEL PODAK, JR., CLERK

IN THE

# Supreme Court of the United States

No. 76-983

October Term, 1976

EUGENE GOSPER,

*Petitioner,*

*vs.*

E. R. FANCHER and THE BROTHERHOOD OF  
LOCOMOTIVE FIREMEN & ENGINEMEN,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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**BRIEF IN OPPOSITION TO PETITION FOR A WRIT  
OF CERTIORARI TO THE COURT OF APPEALS  
OF THE STATE OF NEW YORK**

**Opinions Below**

The opinion of the New York Court of Appeals is reported at 40 NY 2d 867 (1976), affirming the opinion of the New York Appellate Division reported at 49 App. Div 2d 674.

The opinion of the New York Court of Appeals 40 NY 2d 867 (1976) is reprinted in the Appendix at page 1a through 2a. The Opinion of the New York Appellate Division, 49 App. Div. 2d 674 is reprinted in the Appendix at page 3a through 4a.

### **Jurisdiction**

The judgment of the New York Court of Appeals was dated October 22, 1976. The Petitioner invokes the jurisdiction of this Court under Title 28, Section 1257 (3) or 1254 (i) of the United States Code.

### **Questions Presented**

1. Did the New York Court of Appeals err in affirming an order of the New York Appellate Division which held that "upon the trial the jury was erroneously charged that the difference between plaintiff's prior fireman's income and his reduced income after termination was a proper measure of damages and that the union could only be liable for loss of employment damages "to the extent that its refusal to handle the grievance added to the difficulty and expense of collecting from the employer?"

2. Does the New York Civil Practice Law and Rules, Section 5601 (c), which allows an appeal to be taken to New York's highest Court, the Court of Appeals, from an order of the Appellate Division granting or affirming the granting of a new trial or hearing only where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him, raise a substantial federal law question?

### **Constitutional Provisions Involved**

U. S. Constitution, Amendment VII.

### **Statutes Involved**

Railway Labor Act 45 USC, Sections 151a, 152, 153; NY CPLR No. 5601 (c).

### **Statement of Case**

The petitioner, EUGENE GOSPER, was formerly employed by the Erie Lackawanna Railway Company (EL) as a locomotive fireman. He began his employment on or about May 22nd, 1956 with the Delaware Lackawanna and Western Railroad (DLW). In 1960 the Erie Railroad (E) and the D.L.W. merged. Petitioner was continued in the employ of the newly formed E.L. Railroads despite a prior dismissal from the E Railroad for alleged falsification of his employment application and failure to disclose relevant medical information. Petitioner was a fireman and joined the Brotherhood of Locomotive Firemen and Enginemen (B.L.F.E.). He continued working on the EL until February 26, 1965 at which time he was removed from service pending determination of his responsibility for a train wreck which occurred on February 26, 1965.

On May 6th, 1965, petitioner appeared at a disciplinary investigation to answer company charges that he falsified his employment application by concealing prior physical injuries. Petitioner was represented by a local union official of the BLFE and his attorney. On June 7, 1965, petitioner was found to be in violation of company rules and dismissed from the service of the EL.

Prior to his June 7, 1965 discharge, petitioner was also charged with violation of various company operating rules for his involvement in the train wreck of February 26, 1965. A disciplinary hearing was held on May 27, 1965. Petitioner was represented by Respondent General Chairman Fancher of the BLFE. Petitioner, acting on the advise of his lawyer, who was also representing petitioner in his pending F.E.L.A. claim, which had resulted from the February 26th accident, refused to answer any questions concerning the accident. Petitioner was dismissed from service a second time.

Petitioner notified his local chairman of the BLFE and instituted a grievance under Section 33 (3) of the collective bargaining contract. Petitioner alleged that his discharge was in violation of the contract and therefore sought reinstatement. The request was denied by the EL. The local chairman contacted the general chairman and the attorney and advised them of the denial. He then requested the appeal to be handled to the next step.

The general chairman did not progress the appeal because he felt that it lacked merit and that the proper steps under the union constitution and by-laws had not been taken. The attorney did not progress an appeal and failed in settling petitioner's F.E.L.A. case to secure petitioner's job back. Prior to his retirement in 1967, the general chairman had not advised petitioner that the grievance was not progressed. In 1968, petitioner was informed by the new general chairman that the grievance had not been progressed.

On June 19, 1968, petitioner sued the respondents herein for \$296,000.00 in damages for their alleged failure to progress the grievance in an effort to secure his job back, to regain his lost wages and to remove all discipline from his employment record.

The petitioner did not sue the EL Railroad. A jury trial was held. A judgment against the respondents in the amount of \$40,000.00 was awarded petitioner. The respondents appealed the jury finding of unfair representation and the award of money damages against the union as being contrary to the law. The Appellate Division of the State of New York affirmed as to liability but reversed and ordered a new trial as to damages. The petitioner did not seek a new trial but appealed to the New York State Court of Appeals, seeking to set aside the Appellate Division decision on damages and seeking

affirmation of the jury award. In order to proceed directly to the Court of Appeals, the petitioner was required to stipulate under New York CPLR 5601 (c) that should the Court of Appeals uphold the Appellate Division on the issue of damages, that judgment absolute would be entered against him. The respondents cross-appealed to set aside the Appellate Division's affirmance of liability against the respondents for unfair representation and to seek affirmance of the Appellate Division ruling on damages.

The Court of Appeals affirmed as to the Appellate Division's holding on damages. In addition, the Court of Appeals cited this Court's recent ruling in *Hines v. Anchor Motor Freight*, 424 US 554, 96 S Ct. 1048 to "reinforce the conclusion that damages for wrongful discharge could have been sought against the employer in this case. The Court further denied petitioner's application to be relieved of his stipulation for judgment absolute in the event of affirmance. The Court dismissed respondent's appeal on the ground that it did not lie.

Petitioner now seeks a Writ of Certiorari to the Court of Appeals of the State of New York from this Court; Respondents appear in opposition to the granting of the writ.

## ARGUMENT

**I. The Petition does not raise any substantial or important questions of Federal Labor Law nor does it raise any valid conflict of decision between the law as applied by the New York Courts and the Federal Court.**

This Court has dealt exhaustively with the question of an employer's alleged breach of collective bargaining contract and the union's alleged violation of its duty of unfair representation. This line of cases originated with the *Steele v.*

*Louisville & M.R.R.*, 323 US 192 decision and developed into the *Vaca v. Sipes*, 386 US 171 and *Glover v. St. Louis S.F.R. Co.*, 393 US 324. The two questions posed by petitioner have been thoroughly covered in these earlier cases and most recently in the Court's recent decisions in *Andrews v. Louisville & Nashville Railroad Corp.*, 406 US 320 (1972) and *Hines v. Anchor Motor Freight*, 424 US 554 (1976). Although petitioner attempts to raise "new issues", his case is no more than a breach of contract—unfair representation case. He raises no Federal labor law questions which have not previously been answered by this Court. Petitioner is merely "window dressing" in an attempt to get around his failure to sue the employer. The questions that he proposes have been thoroughly dealt with in the *Vaca* line of cases.

Petitioner had a right to sue his employer and he did not. Although petitioner proceeded under a *Vaca* theory of unfair representation and cited *Vaca* in his initial trial memorandum, he failed to join the employer, even though *Vaca* succinctly stated, at 17 L Ed 2d 962:

"A more difficult question is what portion of the employees damages may be charged to the union, in particular, may an award against a union include as it did here, damages attributable solely to the employer's breach of contract? We think not. Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages. The employee should have no difficulty recovering these damages from the employer, who cannot, as we have explained, hide behind the union's wrongful failure to act; in fact, it may be (*and probably should be*) joined as a defendant in the fair representation suit." (emphasis ours).

This Court made it clear in *Vaca* and *Glover*, that an exhaustion of remedies argument would not suffice to let an

employer off the hook for breach of contract where the union, as petitioner alleged in his lawsuit, unfairly represented the grievant. This Court also made it clear that the employer should be joined in the suit. *Czosek v. O'Mara* at 397 US 29, in accord with *Vaca* states:

"damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievance added to the difficulty and expense of collecting from the employer."

Petitioner had a chance to try this issue of damages against the union but waived it, in favor of an appeal to the New York Court of Appeals, on the same damages issue that he lost in the Appellate Division.

Petitioner argues that his case was not one of wrongful discharge against the employer but one against the union for failing to secure his restoration. Without the initial discharge and without the collective bargaining contract providing for job security, there would be no role for the union to play and no basis for seeking job restoration. This Court dealt with an attempt to treat a discharge as something other than a breach of contract claim in the *Andrews v. Louisville & Nashville Railroad Co.*, 406 US 320 and stated that:

"it is conceded by all that the only source of petitioner right not to be discharged and therefore to treat an alleged discharge as a 'wrongful' one that entitles him to damages, is the collective bargaining agreement."

It is quite apparent that petitioner's complaint was primarily, with the employer for discharging him and secondarily, with the union for its alleged failure to grieve his case. Petitioner had the right and obligation to sue his employer, if he intended to seek damages for his discharge. Petitioner never lost this right against the employer. He never had the

right to seek damages against the union alone for the independent affirmative acts of his employer, which resulted in his discharge. In *Hines v. Anchor Motor Freight*, 424 US 554, this Court held that a lawsuit for damages for wrongful discharge against the employer will lie, in spite of a defense based on exhaustion of remedies, where the employee can prove an erroneous discharge and the union's breach of its duty of fair representation.

The New York Courts in applying Federal Labor Law did not leave petitioner without a remedy. It was his own failure to sue his employer for breach of the collective bargaining contract that resulted in an adverse decision on damages. Even if the union violated its duty of fair representation, a money damages award against the union alone where it was the employer's action and not the union's that triggered the controversy, could not stand. The initial damages awarded at trial were not in accord with the Federal Labor Law standards enunciated by this Court and the Appellate Division and the Court of Appeals of the State of New York therefore properly reversed the judgment.

**II. The Petition does not raise any important question of Federal Substantive Law which conflicts with State Procedural Law.**

The Legislature of the State of New York in enacting section 5601 (c) of the Civil Practice Law and Rules has seen fit to require an appellant in any action which originated in the Supreme Court who seeks to appeal an order of the Appellate Division granting or affirming the granting of a new trial or hearing, to stipulate that upon affirmance, judgment absolute shall be entered against him.

The petitioner-appellant was granted a new trial in State Supreme Court by the New York State Appellate Division. The Appellate Division granted appellant the right to determine the proper amount of damages lawfully chargeable against the union for violation of its duty of fair representation.

The Appellate Division cited the controlling federal substantive law for determining damages against the union as enunciated in the *Vaca* line of cases. The Appellate Division ruled that the trial judge had erred in his charge to the jury concerning the proper amount of damages which could be charged to the union as a result of its breach of the duty of fair representation. Petitioner freely chose not to proceed to a new trial on the issue of damages as spelled out in the decision of the Appellate Division. Petitioner chose instead to re-argue his position on damages to the Court of Appeals. In order to proceed to the Court of Appeals, rather than to trial, petitioner freely stipulated that if the Court of Appeals should affirm the Appellate Division, then judgment absolute would be entered against the petitioner. Petitioner's application to be relieved of his stipulation for judgment absolute in the event of affirmance was denied by the Court of Appeals.

Petitioner cites no authority for his novel argument presented to this Court. In effect, petitioner seeks to have this Court set aside legislation of the New York State Legislature which seeks to conserve judicial energies by allowing an appellant a choice of either a new trial or an appeal, but not both. This statutory procedural requirement is not repugnant to federal law. CPLR 5601 (c) merely reflects an attempt on the part of the New York Legislature to implement and enforce judicious procedures to be followed by the attorneys

and the Courts of the State of New York. This State procedural requirement does not raise any important questions of federal law, nor is it violative of the guarantees of the Seventh Amendment.

### **Conclusion**

For the foregoing reasons, it is respectfully submitted that this petition for Writ of Certiorari should be denied.

Respectfully submitted,

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